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ATTORNEY FOR DEFENDANT BLAINE COOPER

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**UNITED STATES OF AMERICA,
Plaintiff-Appellee,**

vs.

**AMMON BUNDY,
RYAN PAYNE,
RYAN BUNDY,
and BRIAN CAVALIER**

Defendants-Appellants.

USCA No. 16-30080

OR District Court No. 3:16-CR-00051-BR

**UNOPPOSED MOTION TO
INTERVENE AS DEFENDANT-
APPELLANT**

Defendant, Blaine Cooper, respectfully moves to intervene in this case as a matter of right pursuant to Federal Rule of Civil Procedure 24(a)(2), or, in the alternative, to intervene permissively pursuant to Federal Rule of Civil Procedure 24(b).

Statement of Facts

On March 28, 2016, Assistant Federal Defender, Rich Frederico, filed a notice of appeal on behalf of his client, Ryan Payne and co-defendants Ammon Bundy, Ryan Bundy and Brian Cavalier. (See Doc. 1. 16-30080) In footnote 1 of that notice of appeal, attorney Frederico indicated that defendant Blaine Cooper may join the appeal at a later date after counsel had an opportunity to confer with her client. At the time of the initial

appeal finding, counsel for Blaine Cooper was out of the country and could not assert a desire to join with the other co-defendants. Subsequent to the filing, counsel notified attorney Frederico of a desire to join in the appeal. In all subsequent filings entered by Mr. Frederico, as well as for the government, Blaine Cooper was part of the caption and all parties proceeded as if Mr. Cooper was part of the appeal. Counsel for Blaine Cooper however, recently realized that a separate motion to appeal, or to join the appeal was not filed on behalf of Mr. Cooper. Mr. Cooper's co-defendants do not oppose this motion. The government does not oppose this motion.

Blaine Cooper is a defendant in 3:16-CR-00051-BR, as well as 2:16-cr-00046-GMN-PAL. The parties named in this appeal, Ammon Bundy, Ryan Bundy, Ryan Payne and Brian Cavalier, all face charges in both districts. All men remain incarcerated in the state of Oregon. All defendants are tasked with preparing for two simultaneous complex cases. The subject of this interlocutory appeal is whether these defendants should be forced to defend both cases at the same time and be forced to travel between jurisdictions to do so. The arguments set forth in the initial as well as the supplementary brief filed by Mr. Frederico apply equally to all named defendants as well as Mr. Cooper.

Argument

Applicable legal precedent is clear that this Court has the authority to allow the movant to intervene as an exercise of its appellate power. Intervention is necessary here to promote judicial efficiency and assure effective appellate review. Defendant, Blaine Cooper, faces the same issues as those named in the notice of appeal. The situation here is more akin to a motion to join the appeal with the interests of all parties being aligned. The fact that Mr. Cooper was not joined in the appeal is a mere oversight of counsel.

Even though the Federal Rules of Appellate Procedure do not expressly contemplate motions to intervene on appeal, the Supreme Court has held that granting

motions to add or join a party "represent[s] the exercise of an appellate power that long predates the enactment of the Federal Rules" *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 834 (1989) (holding that the policy relating to Fed. R. Civ. P. 21 is applicable in the appellate courts).

Although the Federal Rules of Civil Procedure only apply to the district courts (see Fed. R. Civ. P. 1), Rule 24 may provide guidance to the appellate courts in deciding whether to allow new parties to enter a case. *California Credit Union League v. City of Anaheim*, 190 F.3d 997, 998-99 (9th Cir.1990); *Automobile Workers v. Scofield*, 382 U.S. 205, 217 n.10 (1965) ("[T]he policies underlying intervention may be applicable in appellate courts. Under Rule 24(a)(2) or Rule 24(b)(2), we think the charged party would be entitled to intervene. Rule 24(b)(2) gives courts discretion to allow intervention when the applicant's claim has a common question of law or fact within the main action, so long as there is no undue prejudice to the parties.

1. BLAINE COOPER IS ENTITLED TO INTERVENE AS OF RIGHT.

Federal Rule of Civil Procedure 24(a)(2) provides that upon timely motion, the Court must permit anyone to intervene who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Under Ninth Circuit Case law, an applicant is entitled to intervene as a matter of right when:

(1) it has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest. *United States v. Alisal Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004); *United*

States v. City of Los Angeles, 288 F.3d 391, 397 (9th Circ. 2002) Mr. Cooper satisfies each of the conditions as set forth below.

A. Blaine Cooper has a significant protectable interest in this litigation.

As stated above, Mr. Coopers' interests are identical to those named in the appeal. It is an oversight on the part of counsel that he was not included in the original notice of appeal.

B. Disposition of this Case without participation of Mr. Cooper would impede his ability to protect his interest.

As a practical matter, should the court rule in favor of Mr. Ammon Bundy, Mr. Ryan Bundy, Mr. Brian Cavalier and Mr. Ryan Payne, Mr. Cooper would potentially be the lone defendant subject to transportation between jurisdictions to defend two very complex cases. Without inclusion of Mr. Cooper there would be inconsistent results leading to confusion and disparate treatment of similarly situated defendants.

C. Existing Parties do not adequately represent the interests of Mr. Cooper.

The Ninth Circuit has consistently followed the Supreme Court's statement in *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972), that "[t]he requirement of [Rule 24(a)(2)] is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." See, e.g. *Citizens for Balanced Use v. Mont. Wilderness Ass'n*, 647 F.3d 893, 898 (9th Circ. 2011) ("The burden of showing inadequacy of representation is 'minimal' and satisfied if the applicant can demonstrate that representation of its interests 'may be' inadequate." (quoting *Arakaki v. Cayetano*, 324 F.3d 1078, 1086 (9th circ. 2003))).

Blaine Cooper certainly shares a common goal with the named appellants; however, adequate representation and articulation of Mr. Cooper's interests warrants full participation by counsel for Mr. Cooper. It is the intention of Mr. Cooper that Rich

Fredercio, counsel for Ryan Payne, argue the merits of the appeal on behalf of all named individuals; nevertheless, he desires the participation of his counsel to assure his particular interests are represented.

D. The application for intervention is timely.

In the Ninth Circuit, three factors are weighed in determining whether a motion for intervention is timely: "(1) the stage of the proceeding in which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *County of Orange v. Air California*, 799 F.2d 535, 537 (9thCir. 1986).

Oral argument on the appeal is scheduled for June 16, 2016. Appellants supplementary brief was filed on May 25, 2016. All parties consent to this motion. The reason for the delay is simply an inadvertent mistake on the part of counsel. As noted above, Blaine Cooper is named in all pleadings, with his name identified in the caption. It was brought to the attention of counsel on May 26, 2016 that Mr. Cooper was not part of the appeal. Efforts to join the appeal were made immediately.

2. IN THE ALTERNATIVE, BLAINE COOPER IS ENTITLED TO PERMISSIVE INTERVENTION.

Fed. R. Civ. P 24(b)(1)(B) states that "[o]n timely motion, the court may permit anyone to intervene who...has a claim or defense that shares with the main action a common question of law for fact." Clearly, there are common questions of law between Mr. Cooper and the named appellants. Rule 24(b)(3) instructs courts to "consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." As discussed above, Mr. Cooper's participation would not cause any delay or prejudice of this matter.

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CONCLUSION

For the foregoing reasons, Blaine Cooper respectfully requests that this Court grants his Motion to Intervene as a matter of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure or, in the alternative, permissively under Rule 24(b).

RESPECTFULLY SUBMITTED this 26th day of May, 2016.

/s/ Krista Shipsey

Krista Shipsey, OSB #943850
Attorney for Blaine Cooper

9th Circuit Case Number(s) 16-30080

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CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) May 26, 2016.

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

C. Michael Arnold, Arnold Law, 401 E 10th Ave., Ste. 400, Eugene, OR 97401 (A. Bundy)
Todd E. Bofferding, 1215 B Street, P.O. Box 539, Hood River, OR 97031 (Cavalier)

Signature (use "s/" format)

s/ Krista Shipsey